

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLIVERIO MARTINEZ,
Plaintiff-Appellee,

v.

CITY OF OXNARD; OXNARD POLICE
DEPT.; ART LOPEZ, Chief; MARIA
PENA; ANDREW SALINAS; RON
ZAVALA,
Defendants,

and

BEN CHAVEZ,
Defendant-Appellant.

No. 00-56520

D.C. No.
CV-98-09313-FMC
Central District
of California,
Los Angeles
ORDER

Filed January 20, 2004

Before: Kim McLane Wardlaw, Richard A. Paez and
Richard C. Tallman, Circuit Judges.

Order;
Concurrence by Judge Tallman

ORDER

The panel has voted unanimously to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

TALLMAN, Circuit Judge, concurring:

I agree with my colleagues that rehearing en banc is not warranted in this case. Nevertheless, I write separately because, upon consideration of the parties' briefs and the government's amicus brief on Chavez's second Petition for Rehearing En Banc, I believe the Supreme Court acknowledged the need for further development of the factual and legal bases concerning Chavez's qualified immunity defense to Martinez's substantive due process claim. *See Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 2008 (2003) ("Whether Martinez may pursue a claim of liability for a substantive due process violation is thus an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him."). Upon further reflection, I would withdraw our order of July 30, 2003, which could be misconstrued as prejudging the result. We should simply have remanded with instructions to proceed in a manner consistent with the Supreme Court's decision.

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